In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO.

Petition for Certiorari Filed February 24, 1959.
Certiorari Granted April 6, 1959.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW.

Since the filing of petitioner's brief, the opinion of the Court of Appeals, Ninth Judicial District of Ohio, has been reported in 108 Ohio App. 124, 32 Ohio Bar No. 35.

STATUTES INVOLVED.

In addition to the statutes referred to by petitioner (Petitioner's Brief, p. 2), the following statutes of the State of Ohio are involved in this case and are set forth in an Appendix to this brief at pages 35-36:

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20);

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30);

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36);
Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39);
Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43).

QUESTIONS PRESENTED.

1. By pleading a cause of action under the Federal Employers' Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a prima facie case under the Federal Employers' Liability Act by showing that while on duty as a grade crossing watchman he was struck and injured by a reckless and drunken hit-and-run driver?

STATEMENT OF THE CASE.

The petitioner's Statement of the Case and his Questions Presented contain statements of fact and conclusions not supported by the record. For this reason we give a statement of facts supported by the evidence contained in the record.

This case involves injuries to petitioner, a railroad crossing watchman, who was struck by a reckless and drunken hit-and-run driver at a grade crossing in the City of Akron, Ohio, on January 2, 1952, at about 12:00 A. M. Petitioner brought an action in the Court of Common Pleas, Summit County, Ohio, under the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 *et seq.*, alleging that, while performing his duties for respondent, he was standing on Tallmadge Avenue at a point where said street was intersected by Home Avenue just west of respondent's tracks,

when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left-hand turn into Tallmadge Avenue; and as a result of being so struck, petitioner sustained certain disabling personal injuries. Petitioner alleged that respondent negligently and carelessly:

> ordered and directed (petitioner) to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid;
>
> failed to place another employee at said crossing to watch for other trains approaching said crossing, while (petitioner) was on duty flagging, to the end that (petitioner) could keep a look-out and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck (petitioner) as aforesaid. (R. 3.)

Respondent, while admitting that petitioner was struck by an automobile and sustained some personal injuries, denied that such injuries were of the nature and character alleged, and denied that it was in any manner negligent.

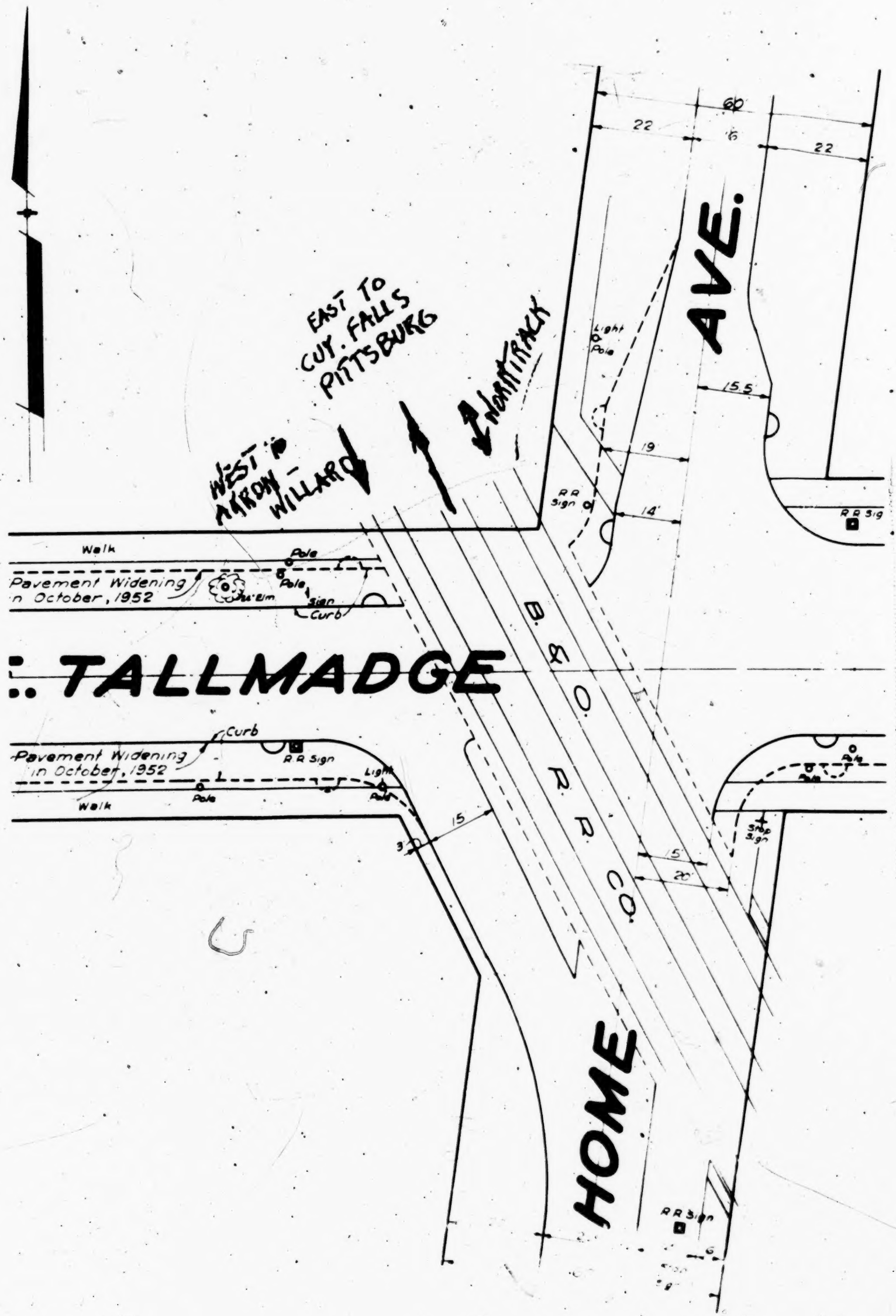
The physical characteristics of the crossing are important in the consideration of this case and warrant a rather detailed description. At this crossing, known as "Bettes Corners," Tallmadge Avenue, a main thoroughfare running east and west, was intersected by Home Avenue, running in a slight northeasterly-southwesterly direction. Three railroad tracks of the respondent extended through the intersection of these two streets in a slight northwesterly and southeasterly direction. The most easterly track was a side or switch track, the middle was

the east bound main track, and the most westerly was the west bound main track (Joint Ex. A; R. 160, 234). The photo-offset reproduction on the opposite page, which is a copy of the central portion of Joint Exhibit A, slightly reduced in size, is presented here to show more graphically to the Court the physical layout of this crossing and the intersection of Tallmadge and Home Avenues.

As shown by this exhibit, there was but one intersection of Tallmadge Avenue and Home Avenue, notwithstanding petitioner's statements to the contrary at pages 3 and 4 of his brief.

All street approaches to the railroad crossing were protected by highway warning signals, commonly known as "flasher lights." Located to the east of the side track and south of Tallmadge Avenue was a watchman's shanty, where the railroad crossing watchman would stay when he was not flagging for approaching trains, and where his special equipment, consisting of lamps, stop signs, fusees, torpedoes, etc., was kept (R. 41). There was also a listening phone in the shanty connected with the nearby XN Tower so that the watchman could hear the dispatcher issuing orders and giving the location of various trains (R. 47). A "tell-tale" flashing light inside the shanty gave the watchman notice of an approaching train (R. 14). Outside the shanty there was a similar flashing light to give notice of approaching trains, which light was located on a 25-foot pole near the south curb of Tallmadge Avenue, east of the crossing (R. 120).

The electrical circuits controlling these signals were so arranged that the "tell-tale" flashing lights in and outside the shanty commenced operation when an eastbound train was 2,066 feet from the crossing, and when a westbound train was 3,455 feet from the crossing (R. 119-121).


EAST TO CUY. FALLS PITTSBURG
WEST TO AKRON - WILLARD
MAIN TRACK
AVE.
60
22
16
22
Light Pole
15.5
19
14'
RR Sign
RR Sig
Walk
Pole
Pavement Widening in October, 1952
Thuja
Sign
Curb
TALLMADGE
B. & O. R. R. CO.
Curb
RR Sign
Pavement Widening in October, 1952
Light
Pole
Walk
15
3
15
20
Stop Sign
HOME
RR Sign
6

either direction was about 2,000 feet from the crossing. Both the flashers and the "tell-tale" lights continued to function until the respective trains had cleared the crossing by 75 to 105 feet (R. 120, 131). There was also a standard railroad block signal located to the south of the crossing on a mast 27 feet high, by which the watchman could determine when any westbound train was within 3,455 feet of the crossing (R. 119, 122).

Kodachrome exposures taken by Fred Tambling, a commercial and industrial photographer (R. 132, 141-143; Dft. Ex. E, F, G, H, I; R. 160, 227-231), and the testimony of D. T. Kingsley, a licensed surveyor (R. 185, 187), showed that the block signal located on the railroad right-of-way could be clearly seen by a person standing in the middle of Tallmadge Avenue 2-3 feet west of the westbound track (the place where petitioner testified he was standing) when the rear of an eastbound train was no more than 134 feet south of the crossing.

All of the signals described were inspected before and after the accident and were found to be in perfect working order (R. 123).

For Home Avenue traffic approaching from the south, there was one standard highway stop sign near the flasher lights before reaching the tracks and another after passing the tracks, directly at the intersection of Tallmadge Avenue, a main thoroughfare (R. 56). There was a City street light on a pole about 25-30 feet west of the tracks on the south side of Tallmadge Avenue, which had a shield to direct the rays downward on to the street (R. 31, 52).

At the time of the accident on January 2, 1952, the petitioner had been employed by The Baltimore and Ohio Railroad Company as a crossing watchman for about seven

years, and had been working the 11:00 P. M. to 7:00 A. M. shift at the "Bettes Corners" crossing for about three years (R. 12). He was thoroughly familiar with the crossing, with his duties and with the Company rules governing the work in which he was engaged (R. 41-42).

Shortly after midnight, the "tell-tale" lights at the watchman's shanty and the highway flashers began flashing, indicating the approach of an east-bound train. As was his duty and custom upon the approach of an east-bound train, the petitioner left the shanty and stationed himself in the center of Tallmadge Avenue, about 2-3 feet west of the west bound tracks. Petitioner was carrying a whistle and lighted red and green lanterns. The night was cold but clear and the pavement was dry (R. 16). When the train "got close enough" to the crossing, the petitioner blew his whistle and began swinging the red lantern which he held in his right hand to stop traffic, first on Tallmadge Avenue, then on Home Avenue, making sure that all vehicles saw the signal (R. 48-49). The crossing was well lighted and he was standing in the rays of one of the City's lights located on the southwest corner of the crossing (R. 55; Pl. Ex. 14; R. 76, 217). Though petitioner, at page 4 of his brief, would have this Court believe that, in this position, he was "directly in the intersection of Tallmadge and Home Avenues," the fact is that he was standing near the centerline of Tallmadge Avenue, about 50 feet west of the point of intersection of the center lines of the two streets. (See copy of Joint Exhibit A, *supra*, opposite page 4; Joint Exhibit A, R. 234.) Projecting the westerly curb line of Home Avenue, it is clearly seen that petitioner was standing about 40 feet west of the westerly limit of the intersection and about 140 feet from the point where the first of the northbound vehicles on Home Avenue was stopped.

As the eastbound train, consisting of a steam engine, 80 empty gondola cars and a caboose (R. 107-109), passed over the crossing, petitioner was standing in the middle of Tallmadge Avenue about 2-3 feet west of the westbound track. The gondolas were open-top equipment and no higher that 7-8 feet above the top of the rails (R. 109). Petitioner testified that "just as the caboose got upon the crossing" he took a step backwards with his right foot and as he turned he was struck by an automobile being driven by a person later identified as James Ball (R. 18). Petitioner further stated that before he was hit, he got a "glimpse of the caboose" which was on the paved portion of the crossing by about 10-15 feet (R. 60); and he admitted that he had seen the caboose up the track when it was about 100 feet south of the crossing and that there were no cars behind the caboose (R. 61).

Sam Bailey, one of the several persons who saw the Ball automobile hit and knock down the petitioner, was in the first car in the line of east bound traffic stopped on Tallmadge Avenue west of the crossing. His driving lights were shining on petitioner who was standing directly in front of his car (R. 67, 69, 74). Bailey admitted the truth of his statement made the day after the accident (Dft. Ex. A; R. 80, 121, 360), wherein he stated: "After the caboose of the north-bound train passed the crossing, the watchman began to walk towards his shanty walking in a southeasterly direction but he was struck by this Plymouth sedan when he was on the running track and near the curb line * * *" (R. 71). Ball's car made a sharp left turn to the left of the railroad tracks and cut in front of Bailey's car where it struck petitioner (R. 72). Bailey stated he had no difficulty seeing these things happen for all the headlights were on (R. 73).

John Martin, another eye witness, also was stopped at the crossing on Home Avenue headed north. He testified that as the train was clearing the crossing the second car in front of him pulled out of the line of traffic, passed the cars ahead of it, and with tires squealing, sped towards the crossing in the southbound traffic lane (R. 98). In describing the path of Ball's car, Martin stated "He (Ball) went up to the tracks, about to the tracks, he may have got on the first track, up close, he made a quick left turn" (R. 99). Martin saw the petitioner, with red and green lanterns in his hands, on the west side of the tracks in the middle of Tallmadge Avenue and remembered seeing him take a few steps forward, or east, towards the shanty (R. 99, 100). Martin stated that as Ball's car started to make the left turn, the car came to a quick stop, "maybe not a dead stop," then the car took off again with the fires squealing (R. 100). He stated that the first car on Tallmadge Avenue headed east had its headlights on, and just as the "hit-skip driver" was making his left turn, Martin saw the front end of this car on Tallmadge Avenue go down from putting on the brakes (R. 101). Martin further testified that petitioner at the time he was struck, was towards the south side of Tallmadge Avenue (R. 101, 104).

Charles Feathers also saw Ball's car leave the line of traffic waiting on Home Avenue south of the crossing, and approach the crossing in the south bound traffic lane. Feathers testified that Ball "left the line of traffic and took off like he was in a hurry to go somewhere, took off fast, pulled out of the traffic and went to make a left hand turn on Tallmadge Avenue, headed west" (R. 86). Ball, shown by uncontradicted evidence to have been under the influence of alcohol (R. 84), made a left turn on the pavement west of the westbound track. Feathers, too, heard the spinning of Ball's tires, (R. 86), and he stated that, to

the best of his memory, petitioner, before he was struck, took two or three steps south on Tallmadge Avenue (R. 90, 91).

Raymond B. Peterson, the flagman on the train, was standing on the rear platform on the caboose facing west as the train passed over the crossing. He saw petitioner and then turned with his back to the caboose facing in a southerly direction, the caboose at this instant being on the crossing (R. 111). Through his side vision, he saw the automobile and he stated: "I turned because it looked to me like it was close and as soon as—I no more than turned my head until the automobile struck him" (R. 111). Peterson testified that petitioner was about 10 feet from the south curb of Tallmadge Avenue when he was struck and the caboose had just cleared the crossing (R. 112). Peterson had no difficulty seeing the petitioner and the red and green lanterns in his hands which were knocked to the ground when petitioner was struck (R. 113).

It is undisputed that from the time that Ball pulled out of the line of traffic until he struck the petitioner, Ball violated the five Ohio traffic statutes set forth in the Appendix to this brief at pages 35-36. Although petitioner had worked for three years continuously as night watchman at this crossing, he offered no testimony that either he or any other watchman at this crossing had ever been endangered by any motorist and offered no testimony of any occurrence like or similar to the unlawful conduct of James Ball.

Petitioner, at page 4 of his brief, makes the amazing statement that "vehicles approaching from the southwest on Home Avenue had the right to and did often turn left into Tallmadge Avenue where the two highways converge along the most westerly track of railroad," and refers to certain photographs (Pl. Ex. 5, R. 214; Dft. Ex. E, R. 227;

Joint Ex. R, R. 236) as support therefor. Petitioner makes a similar statement at page 9 in his Argument. Such statements are wholly without any basis in the record. Not only was there no evidence whatever as to any "right" on the part of such motorists to make a left turn into Tallmadge Avenue through the area west of respondent's westbound track, these statements by petitioner fly in the face of Ohio Gen. Code Sec. 6307-35 (see Appendix), which provides the manner in which left turns shall be made in the State of Ohio. Furthermore, there was not a syllable of evidence offered into the record which would even suggest that any motorist proceeding north on Home Avenue, other than the drunken James Ball, had ever made such a left turn in that area.

The trial of the case resulted in a verdict for plaintiff in the amount of $25,000.00, with the entry of judgment thereon in his favor.

On appeal to the Court of Appeals of Ohio, Ninth Judicial District, respondent urged that error prejudicial to its rights had intervened in the trial of the case, as related in its Assignments of Error (R. 246-248). The Court of Appeals reversed the judgment of the trial court and entered final judgment for respondent, holding that the verdict and judgment of the trial court were not sustained by any probative evidence. The Court of Appeals also ruled that the trial court had committed prejudicial error in its rulings on certain instructions to the jury requested by respondent and in its general charge to the jury, each of which errors would have required a new trial (Opinion, Court of Appeals, R. 248-258; Journal Entry, Court of Appeals, particularly subdivisions (c) through (h), inclusive, thereof, R. 259-261).

In the Supreme Court of Ohio, after the filing of briefs and oral argument, the petitioner's motion to certify the

record was denied and his appeal as of right was dismissed. Thereafter, his application for rehearing was denied (R. 264, 266, 267).

Petitioner, on February 24, 1959, having filed his Petition for Writ of Certiorari, this Court on April 6, 1959, granted Certiorari and ordered the case transferred to its Summary Calendar.

ARGUMENT.

THE COURT OF APPEALS OF OHIO, BY DECIDING THAT THE VERDICT IN FAVOR OF PETITIONER AND THE JUDGMENT RENDERED THEREON WERE NOT SUSTAINED BY ANY PROBATIVE EVIDENCE, DID NOT DEPRIVE PETITIONER OF ANY OF HIS CONSTITUTIONALLY PROTECTED RIGHTS.

1. Petitioner, by pleading a cause of action under the Federal Employers' Liability Act, does not thereby acquire an absolute right to have the case submitted to a jury.

On the appeal of this case to the Court of Appeals, respondent asserted that the trial court prejudicially erred in overruling respondent's motion for a directed verdict and for judgment at the close of all the evidence and in overruling its motion for judgment notwithstanding the verdict, and also asserted other prejudicial errors which would require a reversal and remand for new trial. The Court of Appeals found that the verdict and judgment rendered thereon were not sustained by any probative evidence, and, accordingly, entered final judgment in favor of respondent. Certain other prejudicial errors were found by the Court of Appeals to have occurred on the trial of the case, which errors required a reversal of the judgment and would have required an order of remand for a new

trial had the Court of Appeals not entered final judgment for respondent.

Petitioner appears to be of the erroneous impression that by merely pleading a purported cause of action under the Federal Employers' Liability Act, he thereby acquires an absolute and inalienable right to have the issues drawn by the pleadings submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals examined the record to determine whether there was any evidence to support his cause.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when *evidence* is produced to sustain his claim.

At the time of the adoption of the Seventh Amendment to the Constitution, the common law had, for centuries, prescribed the functions of a jury in the determination of issues of negligence and proximate causation. Credibility of witnesses, the weight and probative value of evidence, as well as reasonable inferences to be drawn therefrom, have consistently been held to be matters for determination by the jury. However, before a particular case is submitted to the jury, there may be, as there was in the instant case, a preliminary question for the determination of the trial court: whether there is any evidence upon which the jury can properly proceed to find in favor of the party upon whom the burden of proof is imposed.

This Supreme Court has uniformly held down through the years that the determination of this preliminary question by the trial court or appellate court does not constitute an invasion of the province of a jury, nor does it

deprive a plaintiff of his constitutionally or otherwise protected right to a trial by jury.

In *Commissioners of Marion County v. Clarke*, 94 U. S. 278, 284 (1877), Mr. Justice Clifford, speaking for the Supreme Court, stated:

> Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. * * *

And in *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524 (1925), Mr. Justice Butler stated:

> (M)any decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

See, also, *Coughran v. Bigelow*, 164 U. S. 301, 307 (1896); *Gunning v. Cooley*, 281 U. S. 90, 94 (1930); *Galloway v. U. S.*, 319 U. S. 372, 389 (1943).

Furthermore, it has been declared that this duty imposed upon trial judges applies with equal vigor to state courts in cases arising under the Federal Employers' Liability Act. *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 474 (1926); *Gulf, M. & N. R. Co. v. Wells*, 275 U. S. 455, 457 (1928); *Toledo St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 168 (1928); *Western & Atlantic R. Co. v. Hughes*, 278 U. S. 496, 497 (1929). And in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479 (1943), this Court stated:

> The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the

> case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims.

In the instant case, the separate motions of respondent, for a directed verdict made at the close of all the evidence, and for judgment notwithstanding the verdict, raised the legal question of whether petitioner, upon whom rested the burden of proof of the alleged negligence of respondent, had produced sufficient evidence to create a jury issue as to such alleged negligence. Here, as in *Eckenrode v. Pennsylvania R. Co.*, 335 U. S. 329, 330 (1948), this question was before the court:

> Was there any evidence in the record upon which the jury could have found negligence on the part of respondent which contributed, in whole or in part, to (petitioner's injuries).

The standard to be applied by a court in reviewing the sufficiency of the evidence in cases arising under the Federal Employers' Liability Act has been more recently enunciated in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), wherein the Court said, at pages 506, 507:

> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death

Subsequent decisions have consistently followed and cited this pronouncement from the *Rogers* case. *Arnold v. Panhandle & Santa Fe R. Co.* 353 U. S. 360 (1957); *McBride v. Toledo Terminal R. Co.*, 354 U. S. 517 (1957); *Gibson v. Thompson*, 355 U. S. 18 (1957). The statement gives recognition to certain fundamental principles which the petitioner would have ignored. First, there must be *proof* (as distinguished from theories or allegations) of negligence. Second, the proof offered must justify the reasonable conclusion that negligence of the employer played *some* part in the injury. Third, there must be some *judicial* appraisal of the proofs. While, on this judicial appraisal of the proofs, the evidence is viewed in a light most favorable to the party upon whom the burden of proof rests, this Court has declared that in cases under the Federal Employers' Liability Act "speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio R. Co.*, 340 U. S. 573, 578 (1951). See also *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559 (1957) (separate opinion of Harlan, J.).

As will be demonstrated by respondent in Subdivision 2 of Argument, the record of this case contains no probative evidence upon which a jury could properly and reasonably conclude that the alleged negligence of respondent played any part in causing petitioner's injuries. The Court of Appeals, in its appraisal of the proofs offered in this case, scrupulously followed these principles, and in so doing reached the only reasonable conclusion possible, *i.e. that there was no negligence on the part of respondent*. There was neither evidence of any failure on the part of respondent to furnish petitioner with those safeguards required by the exercise of ordinary care, nor evidence of any prior occurrence of the kind involving petitioner which would

put respondent on notice of likelihood of danger to one in his position.

Neither the provisions of the Seventh Amendment to the Constitution, nor those of the Federal Employers' Liability Act provide an absolute right to have a case submitted to a jury. It was necessary for petitioner to meet the requirement of presenting "probative facts from which the negligence and causal relation could reasonably be inferred" before such issues could properly be submitted to the jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32 (1944). The Court of Appeals, in appraising the record within the limits of the mandate of the *Rogers* case, found that petitioner had failed to fulfill this requirement. Its reversal of the judgment of the trial court and the entry of final judgment for respondent was with complete legal justification and in conformity with the decisions of this Court.

2. Petitioner, by merely showing that while on duty as a grade crossing watchman he was struck by a reckless and drunken hit-and-run driver, has not established a prima facie case under the Federal Employers' Liability Act.

A. Liability under the Federal Employers' Liability Act is dependent upon proof of employer negligence.

When an employee brings an action for damages against a railroad under the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 *et seq.*, that action is predicated on the alleged negligence of the railroad employer. While some might regard the applicable principles of law outmoded, the fact remains that Congress in enacting this legislation deliberately chose to make a railroad employer's

the cause of action under the Act is for negligence—the same cause of action for negligence as it developed under the common law. Except for certain defenses recognized by the common law which have been modified or abolished by the Act, as amended, in a Federal Employers' Liability Act case the same issues of negligence and proximate cause are present as in any other action for personal injuries based on alleged negligence. As the Supreme Court stated in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1943):

> The Act of 1908 and the amendment of 1939 * * * leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.
>
> In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. * * *

And as stated in *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653 (1947):

> The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury.

See also *Southern Ry. Co. v. Gray*, 241 U. S. 333, 338 (1916); *Urie v. Thompson*, 332 U. S. 163, 192 (1949); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 537 (1957) (separate opinion of Frankfurter, J.); *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326, 333 (1958) (separate opinion

Since the basis of liability under the Act is negligence, that is, the failure to exercise ordinary care under the circumstances, an essential element in the determination of whether a person has failed to exercise such care, is foreseeability of the risk of harm. As was stated in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483 (1943):

> Events too remote to require reasonable provision need not be anticipated. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

None of the recent pronouncements of this Court contain any suggestion that liability under the Federal Employers' Liability Act is predicated other than on negligence. As stated by Mr. Justice Frankfurter, in his separate opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 538 (1957):

> The Court has never intimated that the concept of negligence, undefined in the statute, has some special or esoteric content as used in the Act or is anything other than a statutory absorption of the common-law concept.

In the instant case, the Court of Appeals, upon its appraisal of the proof offered, found that:

> There is no evidence in this record of failure on the part of (respondent) to furnish (petitioner) with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of (petitioner).
>
> That the (petitioner), while in the discharge of

the actions of a drunken driver, violating five traffic statutes and ordinances was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by (respondent).

There was, accordingly, no duty imposed on (respondent) to anticipate such an occurrence as eventuated, and, hence, no negligence for failure to guard against it. (Opinion of Court of Appeals; R. 255).

B. Only negligence which proximately causes, in whole or in part, injury to an employee is actionable under the Federal Employers' Liability Act.

This Court has consistently held down through the years since the enactment of the Federal Employers' Liability Act, that employer negligence, to be actionable, must be a proximate cause of the employee's injury. See *Southern Ry. Co. v. Gray*, 241 U. S. 333 (1916); *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7 (1929); *New York Central R. Co. v. Ambrose*, 280 U. S. 486 (1930); *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272 (1932); *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1943); *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943); *Ellis v. Union Pacific R. Co.*, 329 U. S. 649 (1947).

In the recent decision in the *Rogers* case, this Court stated:

> Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

We submit that this pronouncement in the *Rogers* case leaves unchanged the concept of causation which has long prevailed in the law of negligence, for the word "produce,"

Accordingly, the issue remains as before a question of whether the negligence of the employer caused, in whole or in part, the injury to the employee.

C. The record contains no evidence upon which a jury could properly and reasonably conclude that negligence of the respondent played any part at all in producing petitioner's injury.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured.

The warning devices installed by the railroad had given him ample notice of the approach of the train and he had been furnished with lamps and a whistle to stop highway traffic at the crossing. He was standing at a well-lighted crossing, and the street approaches to the crossing were all protected by operating flasher lights. Automobiles had been stopped for some time awaiting the passage of the train, and the headlights of these automobiles further illuminated the crossing and petitioner. Three waiting motorists gave uncontradicted testimony that petitioner was in plain sight at all times while on the crossing (Bailey, R. 67; Feathers, R. 90; Martin, R. 99). The caboose on the end of the eastbound train was approaching, and petitioner saw it when it was about 100 feet south of the crossing. There was no reason to anticipate danger to petitioner from any source.

What otherwise would have been a routine passage of a train over this crossing was all changed when suddenly a drunken driver pulled his automobile out of the line of northbound vehicles waiting on Home Avenue, passed several standing automobiles, came up to the crossing at a high rate of speed on the wrong side of the street, ignored the stop signs and the operating flasher lights,

made an illegal left turn before reaching the intersection of these two streets, struck and injured the petitioner and raced away from the scene. From the time this driver, James Ball, pulled out of the line of Home Avenue traffic until he struck down the petitioner, he violated the five Ohio traffic statutes quoted in the Appendix to this brief at pages 35-36.

Likewise, there is no dispute as to the fact that petitioner, the unfortunate victim of this drunken hit-and-run driver, James Ball, sustained injuries as a result of his being so struck. However, there is not a syllable of evidence from which the jury could conclude or infer that the respondent knew, or in the exercise of ordinary care should have known, that there was any likelihood of petitioner being endangered by the acts of any motorist waiting at this crossing, including James Ball, in particular.

The words "jumping the gun," used by the witness Bailey and quoted by petitioner in several places in his brief, interpreted most favorably to the petitioner, can mean nothing more than starting ahead of time. Those words cannot be interpreted to mean conduct in any respect comparable to that of James Ball, in pulling out of the line of waiting vehicles, driving on the wrong side of the street in violation of law, failing to stop at Tallmadge Avenue in violation of law, and turning left into Tallmadge Avenue at least 50 feet south and west of the place where a left turn could be made in conformity to law. Those words cannot be interpreted to mean that any motorist had ever before so operated an automobile at this crossing, or had been there guilty of any such violations of law.

Petitioner, by his designation of the testimony of Dr. Fowler Roberts for inclusion in the printed Record of this case, apparently is of the mistaken belief that such testimony lends credence to his case. While petitioner did

sustain injuries as a result of being struck by the motorist Ball, it is a well-settled rule that the mere fact of such injuries, however severe they might be, cannot give rise to liability under the Federal Employers' Liability Act. As stated in *New York Central R. Co. v. Ambrose*, 280 U. S. 486, 490 (1930):

> * * * If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

More recently, in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484 (1943), this Court, in restating the rule, declared:

> Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury.

Contrary to the statements which petitioner now makes in his brief at pages 4-5, the record clearly shows that he did not testify that he had any duty other than to warn highway traffic of approaching trains. He had stopped traffic, first on Tallmadge Avenue, then on Home Avenue, by swinging his lighted red lantern. The red flasher lights at all approaches to the crossing also signalled the approach of the eastbound train, and required all motorists to stop. The train, as it passed over the crossing, created an impassable obstacle to automobiles both headed west on Tallmadge Avenue and headed north on Home Avenue. Petitioner was not required to face the train to look for hot-boxes, notwithstanding the assertions made by petitioner to the contrary in several portions of his brief. Petitioner did not testify, nor did any company rule direct, that he was required to watch for hotboxes.

In an effort to offset the absence of any such evidence in the record, petitioner, at page 7 of his brief, dwells upon certain of the testimony of Raymond Peterson, a brakeman, not the conductor on this eastbound train. Peterson was not in any supervisory capacity with respect to petitioner. In extracting certain comments out of context, petitioner overlooks Peterson's further testimony, as follows:

> Q. And so in order to see if there was anything wrong with your train, any hot boxes or anything else wrong with it he'd have to be looking in an easterly direction, wouldn't he?
>
> A. Yes.
>
> Q. If your train was east of where he was standing?
>
> A. Well that may not be entirely necessary, he could look towards the south or the direction from which we were coming, and get a view of the side of the train at a distance.
>
> Q. But in order to see the cars, hot box, that's something that takes place under the individual car, isn't it?
>
> A. That's right.
>
> Q. That's where the axle is?
>
> A. Yes sir.
>
> Q. So in order to get a good view of a hot box the best view would be when he's right alongside the car, wouldn't it?
>
> A. No sir.
>
> Q. That would be a vantage place, wouldn't it?
>
> A. It would be.
>
> Q. And in order to look this train over he'd have to be facing east, wouldn't he?
>
> A. I said before, not necessarily.
>
> Q. Or southeast, south and east?
>
> A. Yes sir.
>
> Q. Now he's supposed to do that if his duties permit. Of course he had other duties at that crossing?
>
> A. He has traffic to keep.

Q. What about watching for other trains that come from the west going east while he's out there.

A. From the west going east.

Q. Or from the east going west?

A. From the east going west—well of course the crossing watchman could answer that better than I. However, there's a block signal, southeast of Tallmadge Avenue which lights up when there's a train on the circuit which means after it has passed a certain point between Cuyahoga Falls and Tallmadge Avenue.

Q. Well in order to see that he'd have to look—

A. Southeast. (R. 115-116.)

Just as the ancient Roman deity, Janus, alluded to by petitioner at page 9 of his brief, was the creature of myth, the statements by petitioner as to his so-called multiple duties are likewise factually unfounded.

It is apparent from his own testimony that petitioner was not paying any attention to the cars of the passing train on this occasion for he thought it contained about forty-five box cars, although there were actually 80 empty gondola cars in the train, which cars were no higher than 7-8 feet above the rails. Furthermore, there was uncontroverted evidence that the petitioner was not facing the train when he was struck and injured. See the testimony of petitioner (R. 18, 156); Sam Bailey (R. 71); Charles Feathers (R. 90-91); John Martin (R. 99-100); and Raymond Peterson (R. 112).

Respondent had provided petitioner with a red lantern, a green lantern, a white lantern, a shrill whistle and a stop disc for use at the crossing. He had used the whistle and the red lantern to stop the highway traffic on the approach of the train, and he was holding the red and green lanterns in his hands while he was on the crossing before being hit. The "tell-tale" lights in the shanty and atop the [illegible] were both in [illegible]

were the highway flasher lights at all street approaches to the crossing. The block signal south of the crossing could be seen by a person standing where petitioner was standing, when the last car of an eastbound train was still 134 feet from the crossing. The evidence conclusively showed that the caboose at the rear of this eastbound freight train, then moving at about 15 miles per hour, was on the crossing or was leaving the crossing at the time the petitioner was struck down by James Ball. Petitioner himself testified that he had seen the caboose when it was about 100 feet south of the crossing, and that he knew there were no other cars behind it (R. 61). By merely looking to the southeast at the block signal, petitioner could have determined whether any approaching westbound train had reached a point 3,455 feet north of the crossing, while at the same time watching the automobiles waiting at Home and Tallmadge Avenues.

Moreover, the petitioner knew that when the rear of an eastbound train passed over an insulated rail joint 75 feet north of the middle of the crossing, the flasher light circuit for an eastbound train would cease operating. Once the caboose of this eastbound train came on the crossing at a speed of about 12-15 miles per hour, petitioner knew that by the simple expedient of waiting about 3-4 seconds, he could determine whether a westbound train was within 2,000 feet north of the crossing, for if, after the eastbound train passed over the insulated rail joint, the flasher lights remained on, he would know that the westbound train had struck the insulated joint on the westbound main 2,000 feet north of the crossing. Petitioner, by facing in a southerly, southwesterly, or even a westerly direction, and by merely looking at the flasher lights, could have determined the presence of a westbound train within the flasher circuit, since not only would he see the reflection of the red

flasher lights, but, also, the white flashing lights through the windows located on the side of the body of each such light.

There can be no question that these protections afforded petitioner were more than adequate.

Petitioner did not testify or otherwise offer any proof that during the three years he had continuously acted as a watchman on the 11 P. M. to 7 A. M. shift at this crossing, either that there had been any occurrence similar to that which resulted in his injury, or that he, or any other watchman, had ever been endangered while performing the duties of a crossing watchman. It is certain that if there had been any such occurrence or if he had been so endangered, such fact would have been made known by him. The absence of any evidence of previous danger or of any prior occurrence, similar or otherwise, is eloquent proof that respondent had no notice, either actual or constructive, that there was any likelihood of injury to petitioner while in the performance of his duties as a crossing watchman. Petitioner, at page 15 of his brief, implies that respondent would blind itself to every day experience. However, once again, he overlooks the fact made so clear by the record in this case, that there simply had been no "experience" of traffic violations by motorists at this crossing. The decision of this Court in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), quoted by petitioner at page 16 of his brief, is wholly distinguishable from the facts of the case at bar. In the *Ferguson* case, this Court was of the opinion that, on the evidence presented, the jury could conclude that the baker had not been furnished with a safe tool with which to do his work and that it was foreseeable that the baker would attempt to remedy this lack by using a butcher knife to remove the hardened

In both *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943) (cited by petitioner at several places in his brief), unlike the instant case, sufficient probative evidence appeared in the record from which the jury could, with reason, draw the inference that the defendants in those cases were negligent. In *Rogers*, there was uncontradicted evidence that petitioner was where he was in furtherance of explicit orders to watch for hot boxes, and there this Court concluded that such evidence, along with other evidence, "supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury." 352 U. S. at 503. In *Bailey*, evidence as to the nature of the work and the hazards which it entailed, as well as upon other matters, was "for the jury to weigh and appraise." 319 U. S. at 353. Likewise, in *Wilkerson v. McCarthy*, 336 U. S. 53, 60 (1949) (cited by petitioner at page 10 of his brief), there was a conflict in evidence as to whether, after the erection of chain barriers, only pit employees or employees generally used the permanent board as a walk way. The cases of *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955) (cited by petitioner at pages 13-14), and *Schultz, Adm'r. v. Pennsylvania R. Co.*, 350 U. S. 523 (1956), (cited in his brief at page 11), have facts wholly dissimilar to those of the instant case.

In *Woods v. New York Central R. Co.*, 222 F. 2d 551 (6th Cir. 1955), a case with facts very similar to the instant case, plaintiff was employed by the defendant railroad as a crossing watchman at the intersection of defendant's double tracks and Main Street in Springfield, Ohio. At 3:00 A. M., upon receiving a signal that a train was approaching, plaintiff started the flasher lights and took

his position in the middle of the street. While blowing his whistle and swinging his lantern to warn traffic of the approaching train, a motorist crashed into plaintiff and thereafter fled the scene. On the trial, the court directed a verdict in favor of defendant; and upon appeal, the Court of Appeals affirmed, holding that there was no evidence of negligence on defendant's part.

And in *Smith v. Baltimore & Ohio R. Co.*, 204 F. 2d 162 (6th Cir. 1953), cert. den., 346 U. S. 838, a case where the employee's death resulted from the collision of a truck with an engine upon which he was riding, the Court of Appeals affirmed the trial court's direction of a verdict for defendant, and held that the record failed to reveal any substantial evidence of negligence on defendant's part which was a proximate cause of the death, and that, therefore, there was no substantial evidence on which the case could have been submitted to the jury on the issue of negligence.

Murray v. Atlantic Coastline R. Co., 218 N. C. 392, 11 S. E. 2d 326 (1940), was a case where the plaintiff, a trackman, was injured when a motorist crashed into a barricade intended to protect workmen at a crossing. The conditions of the crossing were such that a motorist, in the exercise of ordinary care, would have had sufficient time and space within which to avoid such an accident. The court in the *Murray* case stated that the rule of the ordinary prudent man did not require the railroad company, in the exercise of ordinary care to provide plaintiff a reasonably safe place to work, to anticipate that the driver of an automobile would not see that which was plainly before him or drive with his car so out of control that he could not stop when he saw the barricade or person in the line of travel.

Another case involving a crossing watchman was *Boyd v. Seaboard R. Co.*, 200 N. C. 324, 156 S. E. 507 (1931), cited in the *Murray* case. There the decedent, on the approach of a freight train, went upon the crossing and began flagging traffic with a red lantern. The operator of one automobile, upon seeing the decedent, slowed down, and, as he prepared to stop, another car passed him at a high rate of speed and, without attempting to stop, went onto the crossing and struck the decedent, who was thrown under the train. The court in the *Boyd* case, in sustaining the non-suit of plaintiff, stated:

> * * *(I)t is manifest that the unfortunate death of plaintiff's intestate was proximately caused and produced by the negligent and reckless act of a third party, and that such reckless and negligent act was in no wise related to, growing out of, or dependent upon, any omission of duty upon the part of the defendant.

The record of the instant case discloses no act of omission or commission by respondent which could constitute negligence under either of the specifications of alleged negligence submitted to the jury. Furthermore, the record discloses no such act by respondent which could have played any part at all in producing the injuries to petitioner. There was no evidence from which the jury could reasonably or properly conclude or infer that respondent knew, or in the exercise of ordinary care should have known, that James Ball would, in the process of violating five traffic statutes, strike down and injure the petitioner while he was in the performance of his duties as a watchman at this crossing. Accordingly, there was no evidence upon which this case could properly be submitted to a jury on the issue of alleged negligence on respondent's part.

Recent decisions by this Court have underscored the requirement that in cases where the injury is caused or produced by the wrongful act of a third party, such as in the instant case, there must be probative evidence presented upon which a jury can properly infer that such an injury must have been foreseeable by the employer. In *Lillie v. Thompson*, 332 U. S. 459 (1947), the plaintiff, a female telegraph operator, was criminally attacked at her place of work in an isolated part of defendant's yard. She alleged that defendant was negligent in sending her to work in a place defendant *knew* to be unsafe and frequented by dangerous characters. The appellate court had affirmed the trial court's order made prior to any trial that the complaint be dismissed for failure to state a cause of action. This Court granted certiorari and, in reversing and remanding the cause for trial, stated:

> We are of the opinion that the allegations in the complaint, *if supported by evidence*, will warrant submission to a jury (emphasis added) 332 U. S. at 461.

And in *Cahill v. New York, N. H. & H. R. Co.*, 350 U. S. 898 (1955), the plaintiff charged that the defendant was negligent in improperly directing him to work in an unsafe place with *knowledge* that the place was unsafe. From a judgment in favor of plaintiff, the defendant appealed to the Court of Appeals contending: (1) insufficiency of evidence to permit submission of the case to the jury, and (2) erroneous admission of evidence of prior accidents at the scene of Cahill's injury which had been offered to show negligence by the railroad in failing to warn him of dangers such as had brought about those prior accidents. The Court of Appeals reversed the judgment on the first ground, expressly stating that it found no necessity in passing on

Though this Court granted certiorari and reversed the Court of Appeals, thereby reinstating the judgment of the trial court, this decision was later recalled and the case remanded to the Court of Appeals for its ruling on the question of admissibility of evidence of prior accidents. *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956). Upon its consideration of this question, pursuant to the order of remand, the Court of Appeals, in *Cahill v. New York, N. H. & H. R. Co.*, 236 F. 2d 410 (2d Cir. 1956), was of the opinion that a list of nine prior automobile-train accidents, related by the defendant in answer to an interrogatory propounded by plaintiff, was admissible for the purpose of supporting plaintiff's claim that the defendant knew or should have known that plaintiff's place of work was unsafe because of his inexperience and the claimed inadequacy of instruction as to his duties. The Court of Appeals then went on to state that the admission of this list, even if assumed to be erroneous, would not justify reversal, since two employees of the defendant had testified without objection that automobile-train collisions had occurred in this area in the past, and one of these employees stated that flagmen had been killed there.

In the instant case, unlike the *Lillie* and *Cahill* cases, petitioner neither alleged nor offered any evidence which could even suggest that respondent knew or, in the exercise of ordinary care, should have known that petitioner was or might be in a situation of danger while performing his duties at the "Bettes Corners" crossing.

The *Lillie* case and the *Cahill* case are easily distinguishable from the case at bar. Neither case lends support to petitioner's contentions. In the *Lillie* case, this Court recognized that the allegation of defendant's knowledge

by dangerous characters, must be supported by probative evidence. In the *Cahill* case, this Court remanded that cause for a decision on the question of admissibility of evidence of prior accidents, again recognizing that before a defendant can be found liable under the Federal Employers' Liability Act, there must be admissible evidence presented upon which the jury can determine that danger to the employee was foreseen or foreseeable in the exercise of ordinary care.

Petitioner, at page 14 of his brief, attempts to supply by argument that which does not exist in the record. Petitioner, here, was not inexperienced or untrained as was the claim of plaintiff in the *Cahill* case. Petitioner, Carl Inman, had been employed as a crossing watchman by respondent for about seven years prior to this accident, and he had worked on the 11:00 P. M. to 7:00 A. M. shift at the "Bettes Corners" crossing for about 3 years. (R. 12.) Not only was he familiar with the Company rules and the duties required of him (R. 40-42), he was thoroughly familiar with the flasher light and block system circuits at this crossing (R. 43-45). Standing where he testified he was in the center of Tallmadge Avenue, 2-3 feet west of the westbound track, he was about 50 feet west of the point of intersection of these two streets and, as clearly shown by Joint Exhibit A (R. 160, 234), was outside and west of the intersection, his position being about 40 feet west of the extended westerly line of Home Avenue. Rather than having his back to northbound Home Avenue traffic, petitioner, being about 140 feet from the stop sign located near the flasher light on the east side of Home Avenue, was in a position where, even if facing in an easterly direction, he could glance to his right and observe such traffic while at the same time looking at the block signal and flasher lights south of the crossing.

CONCLUSION.

As shown by the record of the instant case, there was no probative evidence of any character which would even suggest that defendant knew or, in the exercise of ordinary care, should have known that there was even the slightest possibility that petitioner would be injured in the manner that he was injured. The force which solely caused or produced petitioner's injury was an automobile operated by a drunken driver, James Ball, in violation of five traffic statutes. There can be no duty imposed upon an employer in a Federal Employers' Liability Act case, or in any other action based upon negligence, to provide protection against a force which is both unforeseen and unforeseeable. Before negligence on respondent's part can be found to exist, the breach of a duty owed by respondent to petitioner must be shown, for respondent was not required to insure the safety of petitioner while in the performance of his duties at this crossing.

The Court of Appeals, in reversing the judgment of the trial court and entering final judgment for respondent neither erred in its application of the principles of law enunciated by this Court, nor deprived petitioner of any of his constitutionally protected rights.

The decision of the Court of Appeals in this case is not based upon any technical argument as to proximate cause. Rather, it is grounded on the complete absence in the record of any evidence of negligence on the part of respondent. In reaching its decision the Court of Appeals has not weighed the evidence; it has simply looked at the record in accordance with the mandate of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and found that the proofs do not justify the conclusion that there was any negligence on the part of the employer which played any part in producing the injuries to petitioner.

The decision of the Court of Appeals is clearly correct and is in complete conformity with the applicable decisions of this Court. The judgment of the Court of Appeals, Ninth Judicial District of Ohio, should be affirmed.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX.

Statutes of the State of Ohio.

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20):

Reckless operation of vehicles.

No person shall operate a vehicle, trackless trolley or street car without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, trackless trolleys and street cars, and so as to endanger the life, limb or property of any person while in the lawful use of the streets or highways.

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30):

Driving to the left of center line forbidden, when.

(a) No vehicle or trackless trolley shall, in overtaking and passing traffic, or at any other time, be driven to the left of the center or center line of the roadway under the following conditions:

* * *

3. When approaching within one hundred feet of or traversing any intersection or railroad grade crossing, unless compliance with this section is impossible because of insufficient roadway space.

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36):

Rules governing turns at intersections.

The driver of a vehicle intending to turn at an intersection shall do so as follows:

* * *

(b) At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after enter-

ing the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

* * *

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39):

Appropriate signal to be given when turning or changing speed; mechanical signal device.

(a) No person shall turn a vehicle or trackless trolley from a direct course upon a highway unless and until such person shall have exercised due care to ascertain that such movement can be made with reasonable safety to other users of the highway and then only after giving a clearly audible signal by sounding the horn if any pedestrain may be affected by such movement or after giving an appropriate signal in the event any traffic may be affected by such movement.

* * *

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43):

Right-of-way at through highway; stop signs.

(a) The operator of a vehicle, intending to enter a through highway, shall yield the right of way to all other vehicles, street cars or trackless trolleys on said through highway.

(b) The operator of a vehicle, street car or trackless trolley shall stop in obedience to a stop sign at an intersection where a stop sign is erected and shall yield the right of way to all other vehicles, street cars or trackless trolleys not so obliged to stop.